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No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. All parties have filed consent letters with the Clerk regarding *amicus* briefs.

Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

NSBA and AASA regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA"). *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455 (2006); *Schaffer* v. *Weast*, 126 S. Ct. 528 (2005).

Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, NSBA and AASA have consistently supported the rights of disabled children. At the same time, both are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to educating students with disabilities.[2] These resources vastly exceed the partial funding provided by the federal

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[2] "Roughly a third of [New York City's] $14 billion education budget is spent on special ed, serving some 150,000 students out of a total school population of 1.2 million." Editorial, *Special-Ed Savings*, N.Y. Post, Nov. 30, 2005 at 30.

government under IDEA.[3] The burden on local school districts also is increased by an adversarial conception of IDEA, which exacts an even greater toll on limited educational resources and thus exacerbates the difficulty for school districts in deciding what educational opportunities they can afford to provide for children.

The issue presented in this case, therefore, is of manifest importance to NSBA and AASA: whether Congress in IDEA authorized tuition reimbursement for parents, like respondent, who unilaterally place their children in private schools before ever trying—and without ever intending to try—the proposed Individualized Education Program ("IEP") developed in a collaborative effort between school district employees and a child's parents or guardians.[4] NSBA and AASA, like the petitioner, contend that the answer is no.

SUMMARY OF ARGUMENT

In *Burlington School Committee* v. *Department of Education*, 471 U.S. 359 (1985), this Court held that private school tuition reimbursement was an available remedy under IDEA if a school district failed to provide a free appropriate public education to a child with a disability, even though the statute was silent on that point. Congress thereafter amended IDEA in 1997 to allow a tuition reimbursement remedy only

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[3] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $59 billion for the last four fiscal years. NSBA, *Federal Funding for Education* at 2 (Mar. 2006), *available at* http://www.nsba.org/site/docs/35100/35033.pdf.

[4] School districts spend more than $6.7 billion annually on assessments, evaluations, and IEP-related activities alone. *See* Special Educ. Expenditure Project, American Inst. of Research, *What Are We Spending on Special Education Services in the United States, 1999-2000?* at 13-14 (updated 2004), *available at* http://www.csef-air.org/publications/seep/national/AdvRpt1.PDF.

where the child has "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10) (C)(ii).

The Second Circuit decision giving rise to this case, *Frank G.* v. *Bd. of Educ. of Hyde Park*, glossed over the plain language and clear intent of the 1997 amendment, disagreeing with Congress' policy choice and finding that interpreting this provision according to its plain meaning would not be "compatible with the rest of the law" and would create an "absurd" result. 459 F.3d 356, 372 (2d Cir. 2006). The Court of Appeals erred. Because IDEA favors public school placements, provides few rights for private school students, establishes a collaborative framework that integrally involves parents and public school officials, and provides multiple methods for timely dispute resolution, Congress sensibly required parents to work with public school districts before being able to unilaterally obtain a publicly funded private school placement.

Congress enacted the Education of All Handicapped Children Act of 1975 with the goal of opening "the door of *public* education to handicapped children"—not to provide publicly funded private school education to children with disabilities. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 192 (1982) (emphasis added). Renamed IDEA in 1990, the Act today continues to "ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). In accord with its fundamental purpose, virtually all of the Act's many substantive and procedural requirements apply only to public schools and protect only children attending public schools.

In addition, the structure of IDEA favors public school placements. While the Act also addresses the needs of children with disabilities whose parents elect to place them in private schools, it expressly does not create any individual

entitlement to special education services for such children. To the contrary, the main provisions of the Act with respect to students in private schools are designed to make sure that they are found and made aware of their right to a free appropriate *public* education. Indeed, IDEA even limits the circumstances in which a public school district can resort to a private school placement for a child whose needs the district does not believe it can meet.

The Act also establishes a collaborative framework that requires ongoing cooperation between school districts and parents or guardians in developing, implementing, and refining each child's educational program in public schools. Congress' decision to require parents to give this process a fair chance before being eligible for private school tuition reimbursement supports this overall framework. The Act demands the good faith participation of both school district personnel and the parents and guardians of disabled children. The cooperative process results in the development, implementation and continuous adaptation of an IEP designed to ensure that each student receives a free public education that is appropriate to his or her individual needs. The process is dynamic; it gives parents multiple opportunities to effect a change in services they believe to be inadequate. These opportunities, along with the prompt dispute resolution mechanisms mandated by the Act, alleviate any fear that children with disabilities would be forced to languish for extended periods in inappropriate placements to preserve their entitlement to tuition reimbursement. By ignoring these aspects of the law, the Second Circuit's ruling seriously undermines IDEA's collaborative framework by creating a disincentive for the parents of students with disabilities to cooperate in good faith with a public school district.

Allowing unilateral private placements for parents who have not given a public school placement a fair chance also would increase the already substantial costs of the Act. Litigation costs, of course, would increase. More expensive

private school placements would be sought and approved. The federal government funds only about twenty percent of IDEA's cost, meaning that the inevitable result of increased costs would be to divert state and local resources to private schools and diminish the funding available for special education and regular education programs in public schools.

The decision below should be reversed.

ARGUMENT

THE 1997 AMENDMENT TO IDEA LIMITING AWARDS OF TUITION REIMBURSEMENT IS ENTIRELY CONSISTENT WITH THE PURPOSE OF THE ACT, ITS COLLABORATIVE FRAMEWORK AND SOUND PUBLIC POLICY.

As part of its 1997 IDEA amendments, Congress sensibly adopted a basic threshold requirement for tuition reimbursement claims by parents who unilaterally place their children in private school: tuition reimbursement is only available for children who "previously received special education and related services under the authority" of the public school district. 20 U.S.C. § 1412(a)(10)(C)(ii). The plain language of this provision makes clear that where a child has not previously received special education from a school district, neither a court nor a hearing officer has authority to reimburse tuition expenses arising from a parent's unilateral placement of the child in private school.

The Second Circuit found ambiguity in this clear language because it misunderstood IDEA's purpose, structure, and the manner in which the Act works in practice. *Frank G.*, 459 F.3d at 370. A straightforward interpretation of Section 1412(a)(10)(C)(ii), however, is consistent with Congress' intent to "open the door" to public education for students with disabilities while respecting our Nation's tradition of local control of public education. *Rowley*, 458 U.S. at 192. It also furthers the Act's collaborative framework by preventing parents who lack genuine interest

in educating their child in a public school setting from treating the IEP process as a potential lottery ticket to a government funded private school education. And it is consistent with IDEA's deference to local school district's educational expertise.

A. The Plain Language And Legislative History Of The Amendment Show Congress' Clear Intent To Authorize Tuition Reimbursement Only When Students Have Tried A Public Placement.

Although not mentioned as a form of relief in the Act prior to the 1997 amendments, this Court endorsed private school tuition reimbursement as within the equitable remedies available for violations of the Act. *See Burlington*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7 (1993). In 1997, consistent with both IDEA's goal of educating children with disabilities in the regular public education setting whenever possible and the collaborative structure of the Act, Congress wisely limited the availability of the tuition reimbursement remedy to situations in which parents or guardians have previously cooperated in the development and receipt of publicly directed special education and related services. The amendment simply requires that parents of children with disabilities give public schools a realistic chance to serve their children before unilaterally rejecting what the public school offers—and forcing the school district to fund a private school education.

The 1997 amendment thus plainly states that private school tuition reimbursement is only available when a student has "previously received special education or related services." 20 U.S.C. § 1412(a)(10)(C)(ii). In enacting this provision, Congress explicitly limited the circumstances in which the retroactive tuition reimbursement that this Court found in *Burlington* and *Carter* could be "appropriate" relief for a failure to provide a free appropriate public education. Under the governing law, then, retroactive tuition reimbursement can only be "appropriate" where parents have given the

public school districts some opportunity to attempt to provide a free appropriate public education.

This conclusion is dictated by the plain language of the statute. The starting point for interpreting a statute is always the language of the statute itself. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). When the language of the statute is plain, that is also "where the inquiry should end" because " 'the sole function of the courts is to enforce it according to its terms.' " *United States* v. *Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). This principle applies with force here.

Section 1412(a)(10)(C) is unambiguous on its face: "the plain language of the statute [] mandates that prior receipt of special education and related services is a prerequisite to reimbursement." *Lunn* v. *Weast*, No. 05-2363, 2006 WL 1554895, at *7 (D. Md. May 31, 2006); *see also Baltimore City Bd. of Sch. Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 249 (D. Md. 2005) (where student has not previously received publicly directed special education, "the statutory text commands (and permits) only one result: her parents are not eligible for tuition reimbursement under the IDEA"); *Carmel Cent. Sch. Dist.* v. *V.P. ex rel. G.P.*, 373 F. Supp. 2d 402, 415 (S.D.N.Y. 2005) (holding tuition reimbursement not available as a matter of law, without regard to *Burlington* factors, where parents "never placed their child in the public school and never contemplated doing so" and did not give public school "a meaningful opportunity" and a "realistic chance" to see if it could implement an IEP allowing the student to be educated in the public schools); *Forest Grove Sch. Dist.* v. *T.A.*, No. 04-cv-331, Order & Opinion 21 (D. Or. May 11, 2005) ("The plainest reading of the statute is that *only* children who had previously received special education services from the District are even eligible for such tuition reimbursement.") (emphasis in original).

But even if the provision were ambiguous, the legislative history reveals the same intent: that parents not be allowed to receive tuition reimbursement for a unilateral private placement if their child has never previously received special education or related services from a public school district. Both the House and Senate Reports clearly state that "parents may be reimbursed for the cost of a private educational placement *under certain conditions*"—and then identify one of those conditions as "[p]reviously, the child must have had received special education and related services under the authority of a public agency." *See* H.R. Rep. No. 105-95 at 93(1997) (emphasis added); S. Rep. No. 105-17 at 13 (1997).

It also is important to remember that "resolution of the question presented in this case is guided by the fact that Congress enacted IDEA pursuant to the Spending Clause." *Arlington*, 126 S. Ct. at 2458. Because legislation enacted under the Spending Clause is "much in the nature of a contract," any conditions attached to funding must be laid out "unambiguously" in order to be binding, and states must accept these conditions "voluntarily and knowingly." *Id.* at 2459 (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Thus, the issue here is whether given the plain language of Section 1412(a)(10)(C)(ii), IDEA "furnishes clear notice regarding the liability at issue in this case." *Arlington*, 126 S. Ct. at 2459. Clear notice, as the Court has recently reiterated, "begin[s] with the text." *Id.*

To determine whether the requisite clear notice exists here, the Court "must view the IDEA from the perspective of a state official" trying to determine "the obligations that go with those funds." *Id.* The clarity of the condition is determined in the first instance by looking at the text of the statute itself. *Id.* And although IDEA's "overarching goal" is to ensure education for all disabled children, the Act does not seek to achieve this goal "at the expense of all other considerations, including fiscal considerations." *Id.* at 2463. For Spending Clause legislation, like IDEA, the key is "what

the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Id.* Thus, when the text of a statute contains no clear notice of a condition on federal funding, the Court is not at liberty to impose one.

A review of state regulations regarding tuition reimbursement for unilateral placements further demonstrates the lack of clear notice. Numerous states have adopted regulations similar to Section 1412(a)(10)(C)(ii). *See, e.g.*, N.J. Admin. Code 6A:14-2.10 (2006); Md. Code Regs. 13A.05.01. 16B(3)(d) (2006). State administrative hearing officers have interpreted these state regulations to preclude reimbursement if a student has not previously received special education and related services from the school district.[5]

B. Congress' Decision To Limit Tuition Reimbursement In This Way Is Consistent With The Act's Overall Purpose And Structure.

The Second Circuit gave little heed to the amendment's plain language, Congress' clear intent, or the understanding of the state and local officials charged with implementing IDEA because it believed that the result was inconsistent

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[5] *See, e.g., J.P.* v. *Wyckoff Bd. of Educ.*, N.J. OAL Docket No. EDS 09100-04, 2005 WL 2306866, at *33 (Sept 9, 2005) (holding "phrase 'who previously received special education and related services from the district of residence,' N.J. A.C. 6A:14-2.10(b), has been interpreted in New Jersey's administrative law courts to mean that parents who unilaterally move their child to a private placement without the consent of the school district are precluded from reimbursement if their child has never received special education or related services"); *XXX* v. *Montgomery County Pub. Sch.*, OAH No. MSDE-MONT-OT-05-21215, at 20 (June 24, 2005) (concluding that student who had not previously received special education services from school district was "therefore not entitled to reimbursement for the unilateral private placement for the 2004-2005 school year"), *available at* http://www.marylandpublicschools.org/NR/rdonlyres/60F8031E-5011-4970-8250-97CFA4F81F02/7531/05HMONT21215.pdf, *aff'd sub nom. Lunn* v. *Weast*, 2006 WL 1554895.

with other aspects of the Act and would lead to unfair results. The experience of school districts and school administrators nationwide shows those concerns to be misplaced.

Rather, the 1997 addition of Section 1412(a)(10)(C)(ii) is entirely consistent with the fundamental Congressional preference for public school placements, the overall structure of the Act, and the experience of school districts in implementing its provisions. This amendment merely requires parents to give a school district that believes it can provide a free appropriate public education to a child a reasonable opportunity to attempt to do so. To flip this requirement on its head by requiring school districts to reimburse the cost of private school tuition without first affording the district this opportunity would be to ignore the Act's clear purpose of ensuring children with disabilities have appropriate educational opportunities in public schools.

1. IDEA's History And Fundamental Requirements Show That Appropriate *Public* School Placements Are Preferred.

The principal motivating force behind Congressional enactment of a federal statute governing the education of students with disabilities was to stop the exclusion of disabled students from *public* schools—not to increase their opportunities to attend private schools at public expense. In the 1970s "the majority of disabled children in America 'were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.' " *Schaffer* v. *Weast*, 126 S. Ct. 528, 531 (2005) (quoting H.R. Rep. No. 94-332 at 2 (1975)). Congress' findings from the recent 2004 IDEA reauthorization re-emphasize this fact. Before the enactment of IDEA and its precursor, "the educational needs of millions of children with disabilities were not being met because * * * the children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2).

The purpose of IDEA was "to reverse this history of neglect" and bring students with disabilities into the mainstream of the public school community. *Schaffer*, 126 S. Ct. at 531. This purpose is readily apparent: "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the *public education systems* of the States." *Rowley*, 458 U.S. at 189 (emphasis added); *see also id.* at 192 (explaining that in enacting IDEA's precursor, "Congress sought primarily to make *public* education available to handicapped children").

a. The statute's frequent use of the word "public" emphasizes Congress' intent that students with disabilities be educated in public schools. The well-recognized mandate of IDEA is to "ensure that all children with disabilities have available to them a free appropriate *public* education." 20 U.S.C. § 1400(d)(1)(A) (emphasis added); *see also* S. Rep. No. 105-17 (1997) ("critical issue now is to place greater emphasis on * * * ensuring that children with disabilities receive a quality public education"). A free, appropriate public education is one that includes special education and related services provided "at public expense, *under public supervision and direction*, and without charge" and provided in conformity with the IEP developed for the student. 20 U.S.C. § 1401(9) (emphasis added).

Notably, this publicly supervised and directed education need not "maximize each child's potential"; it must rather "be sufficient to confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. at 198, 200. Parents are always free to choose different educational opportunities for their children at their own expense, should they consider that placement more likely to maximize their child's potential. But the "IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense." *Fort Zumwalt Sch. Dist.* v. *Clynes*, 119 F.3d 607, 612 (8th Cir. 1997). *See, e.g.*, *Doe* v. *Board of Educ. of Tullahoma City Sch.*, 9 F.3d 455,

459-460 (6th Cir. 1993) ("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student," not that it cede to a student's demand that the school system "provide a Cadillac" solely for [his] use.). School districts cannot realistically provide a "Cadillac" education program to every child with a disability, given the near-constant fiscal constraints they face. *Cf. Arlington*, 126 S. Ct. at 2463 (IDEA does not seek to promote its broad goals "at the expense of fiscal considerations").

b. The Act's "least restrictive environment" ("LRE") mandate, also known as its "mainstreaming" requirement, further underscores IDEA's goal of promoting public school access for children with disabilities. 20 U.S.C. § 1412(a)(5). Through this requirement, the Act incorporates a strong preference that children with disabilities attend schools and classes with children who are not disabled whenever possible—giving rise to a presumption in favor of a child's placement in the public schools. *See, e.g., Independent Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 561 (8th Cir. 1996).

Given the mandate to educate children in the least restrictive environment, a public school is obligated to provide special education and related services in the public schools whenever possible. A school district may only resort to use of a private school to educate a child with a disability when "public educational services appropriate for the handicapped child are not available." *Hessler* v. *State Bd. of Educ.*, 700 F.2d 134, 138 (4th Cir. 1983). The public school has a duty to provide services to the student and include the student in the public school community to the maximum extent practicable.

As a result, only public schools must offer opportunities for maximized participation in the regular curriculum. Students whose parents opt for a private school education—even at one of the rapidly expanding number of private schools marketing themselves as offering expertise or a particularized

focus on disabilities—do not receive this same federally enforceable guarantee.[6] While parents certainly have the right to forfeit the benefits that this guarantee may provide to their children, IDEA should not be interpreted to support at public expense parents who reject the statute's strong preference for mainstreaming.

c. IDEA's preference for public school placements for children with disabilities also is evident in the comprehensive procedural safeguards by which parents can enforce the Act's provisions only against public school districts in order to ensure the delivery of a free appropriate public education for their child. For example, parents have the right to examine all records and to participate in all meetings about the identification, evaluation, and educational placement of their child. If a public school district proposes to change a child's IEP, the parents must receive prior written notice, in their native language, including a description of and explanation for the action proposed or refused, a statement that the parents are protected by procedural safeguards, sources for parents to contact to obtain assistance, a description of other options that were considered, and a list of factors relevant to the decision. If parents object to their child's placement or the services that he or she is receiving, they have the opportunity for an impartial due process hearing, mediation, and a civil action. 20 U.S.C. §§ 1415(a-i). Again, parents may choose to give up these rights, which are intended to ensure that their children receive an appropriate education, but the provision at issue here should not be read to encourage parents to so easily discount the importance of these rights in promoting the overarching purpose of the Act.

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[6] According to the National Center for Educational Statistics, the number of private schools with a special education emphasis grew from 1059 in 1989-90 to 1634 in 2003-04. *Characteristics of Private Schools in the United States: Results from Private School Universe Survey* (2004), *available at* http://www.nces.ed.gov/surveys/pss/.

2. IDEA's Separate Provisions For Children Attending Private Schools At Their Parents' Election Expressly Create No Individual Entitlement To Special Education Services.

IDEA's provisions regarding children placed in private schools by their parents counsel strongly against permitting parents to recover the costs of tuition when their child has never received special education services from the school district. The Act explicitly "does not require" a school district "to pay for the cost of education including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).[7] The regulations confirm that "[n]o private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a).

Instead, the Act has entirely different, and far less extensive, provisions to support the education of private school students with disabilities. School districts have only a few limited obligations with respect to students with disabilities in private schools. Their principal obligation is to identify those students, so that they and their families can be made aware of the special education services that would be available to them in a public school. *See* 20 U.S.C. § 1412(a)(10)(A)(ii); 34 C.F.R. § 300.451(b).

If students identified through these "child find" activities choose to remain in private school, school districts' responsibility for these students consists primarily of

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[7] Only where a school district cannot or does not offer a free appropriate public education is a publicly funded private school placement authorized by IDEA. *See* 20 U.S.C. § 1401(9); *Burlington*, 471 U.S. at 373-374.

allocating a share of *federal* IDEA funds to their private school education. 20 U.S.C. § 1412(a)(10)(A)(i)(I). The allocated share is determined by comparing the number of disabled students attending private schools in the district to the total number of children with disabilities being educated in the district. *Id.* § 1412(1)(10)(A)(i). Because federal funds represent only a small fraction of the amount needed to provide the services required by IDEA in public schools, this allocation does not guarantee similar service, or even any service, to any particular child with a disability in a private school. As a result, special education services in private schools "are, not surprisingly, less extensive than the services that a disabled child enrolled in a public school is entitled to receive." *Greenland Sch. Dist.* v. *Amy N.*, 358 F.3d 150, 157 (1st Cir. 2004).

In sum, Congress' decision to require parents to attempt a public placement before being eligible for a tuition reimbursement remedy is entirely compatible with the principal focus of IDEA, which indisputably is the education of students with disabilities in public schools.

C. Congress' Limitation Of The Tuition Reimbursement Remedy Also Supports The Collaborative Framework Of The Act.

The "core of [IDEA] * * * is the cooperative process that it establishes between parents and schools." *Schaffer*, 126 S. Ct. at 532. *See also Rowley*, 458 U.S. at 205-206 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). The collaborative decision-making process at the heart of IDEA is undermined when parents do not cooperate in good faith with school districts. Congress' decision to require parents at least to attempt to ensure an appropriate public school placement before they are eligible for private school tuition reimbursement fosters just such good-faith collaboration. *Amici* urge this Court to reiterate here the critical importance of collaboration to the success of IDEA's fundamental goals.

1. IDEA Establishes A Collaborative Framework For Parents And Public Schools To Work In Tandem To Ensure Appropriate Educational Programs For Children With Disabilities.

a. As the Court recently stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 126 S. Ct. at 532. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988).

Parents are also involved in an ongoing process of evaluating the implementation of the child's educational program and revising IEPs. The Second Circuit's assumption that parents would have to watch their children languish in inappropriate placements if the plain meaning of the 1997 Amendments were respected thus rests on the false assumption that the IEP process is static. *Frank G.*, 459 F.3d at 372. To the contrary, it is a dynamic process. At least annually—and more often if necessary—the whole IEP team, including the parents, formally reviews whether the plan's goals are being achieved and revises the IEP as needed to address areas in which there has not been sufficient progress. The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3-4).[8] Moreover, after an initial determination has been made, if the parent or school

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[8] The Act imposes other tight timelines on school districts to ensure prompt action. For example, if a parent objects to the IEP, a school district has only ten days to respond. *Id.* § 1415(i)(2)(B). In addition, a full, individual evaluation of whether a child has a disability and the nature of the child's education needs must take place with 60 days of receiving parental consent. *Id.* § 1414(a)(1). In contrast, IDEA establishes no such timelines for action by private schools.

team believes that the amount of service needs to be either reduced or increased, the IEP may be reviewed by the team to consider any circumstances that may require a change. A parent may request such a review of IEP services at any time, as may school staff. In some situations if the change in services is small and the parents and school team are in agreement, the change can occur through the mechanism of an IEP amendment, without even holding a formal meeting. As a result, it is not uncommon for parents and school districts to agree to multiple changes in an IEP or its implementation during a single semester.

The need for such constant monitoring and revision inheres in the fact that developing and implementing an IEP is "an inexact science at best." *Honig*, 484 U.S. at 321 (1988). Such programs have to address a complex variety of factors that affect the learning strengths and weaknesses of an individual child. Because an IEP is sometimes not perfect when first implemented, having a continuous process of collaboration among parents, schools and other professional educators subject to ongoing formal and informal reevaluation and revision is critical. As a result of the continuing collaboration, workable plans are developed around the unique challenges faced by each individual child. Without a serious commitment to that process by both families and schools, it cannot be successful.

Requiring parents to at least try the services recommended by an IEP team before rejecting them in favor of a private placement is entirely consistent with this collaborative model. Likewise, requiring parents to work in good faith with school staff recognizes the reality that it may require an ongoing process of adaptation to provide a free appropriate public education to any given child. By contrast, to allow a parent who has never been inside a public school to walk away from the process and receive a free private education at public expense based on an initial disagreement about educational recommendations described on a piece of paper

would belittle both the cooperative approach of IDEA and the complexity of educating disabled students.

b. IDEA's emphasis on prompt cooperative solutions also imposes obligations on school districts and parents alike to ensure their good faith commitment to a truly collaborative process. The 1997 amendments, for example, included a number of provisions that made some of the procedural duties of parents quite explicit. Requiring cooperation in these smaller ways would make little sense if the Act allowed parents to reject a proposed placement without ever even trying any services offered by the public school district.

The 1997 amendments, for example, added a provision indicating that reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Therefore, before removing a child from a public school, parents must inform the IEP team that they are rejecting the placement proposed by the team, state their concerns with the proposal, and indicate their intent to enroll their child in a private school at public expense. 34 C.F.R. § 300.148(d). In addition, parents must give the school district written notice of these factors at least ten days prior to removing their child from a public school. *Id.* The reason for this is clear: Without a good faith commitment to the process by all parties, true collaboration in determining the development and implementation of a free appropriate public education would not be possible. *See, e.g., M.S.* v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007) (parents' refusal to cooperate prevented creation of appropriate IEP).

Even before the 1997 amendments made these procedural duties so explicit, several circuits had held that reimbursement for private school tuition depended on the parents cooperating with school authorities in determining the proper placement and educational plan for the child. *See Patricia P.* v. *Board of Educ.*, 203 F.3d 462, 468 (7th Cir. 2000) (listing

cases interpreting pre-amendment IDEA). As the *Patricia P.* court aptly noted, "parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement." *Id.* at 469. Another circuit similarly has noted that "Even before the IDEA was amended to explicitly require such notice, this court held that dissatisfied parents were required to complain to the public school to afford the school a chance to remedy the IEP before removing their disabled child from the school." *Berger* v. *Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003). All of these cases are consistent with *Burlington*, which itself recognized that parents could equitably disentitle themselves to tuition reimbursement. 471 U.S. at 373-374.

School districts, too, share an obligation under the statute to attempt in good faith to negotiate workable IEPs—and to agree to private placements when they cannot. And school districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. In 2005, for example, there were 88,098 students with disabilities educated in private schools at public expense. *See* United States Department of Education, IDEA data, Table 2-5: Number of students ages 6 through 21 served under IDEA, Part B, in the U.S. and outlying areas, by disability category and educational environment, Fall 1996 through Fall 2005, *available at* https://www.ideadata.org/tables29th/ar_2-5.htm. The overwhelming majority of these placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA. School districts thus voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements—which occur when the collaborative process established by the Act is operating as it is intended.

c. As this Court has recognized, the collaborative emphasis of IDEA is present even in its dispute-resolution mechanisms, which promote timely and amicable resolutions wherever possible. *See Schaffer*, 126 S. Ct. at 535. The Second Circuit, however, misunderstood these mechanisms when it expressed concern that interpreting Section 1412(a)(10)(C)(ii) consistent with its plain language would force parents of students with disabilities simply to acquiesce to inappropriate placements in order to preserve their right to seek reimbursement for a private school placement. *See Frank G.*, 459 F.3d at 372. At a threshold level, parents' procedural rights are designed to ensure parents are involved in the process of developing a timely, appropriate placement for their child from the outset. But even if parents disagree with the placement recommendation that results from this collaborative process, they have many options besides simply acquiescing in what they feel to be an inappropriate placement for an extended period of time. In fact, parents' extensive procedural rights prevent this result.

The Act establishes procedures to ensure a prompt resolution of disputes, in the event that the collaborative approach of the IEP process is unsuccessful. Under IDEA, school districts are required to respond to parents' complaints within a short timeframe. Indeed, since the adoption of Section 1412(a)(10)(C)(ii), Congress has tightened the deadlines applicable to public school districts. For example, when a school district receives notice of a due process complaint, it has only 10 days to explain to the parents why it has proposed or refused to take the action at issue, including describing the other options that were considered, why they were rejected, and the evaluation procedures, assessments, records, or reports that were used to make the decision. 20 U.S.C. § 1415(c)(2)(B)(i)(I). Within 15 days, the school district must convene a meeting with the parents and relevant IEP team members, at which the parents and child are given an opportunity to discuss their complaint and try to resolve the dispute amicably. *Id.* § 1415(f)(1)(B). If the complaint is

not fully resolved within 30 days, a due process hearing must be scheduled. *Id.* The Act also provides parents and guardians with a right to publicly funded, confidential mediation. *Id.* § 1415(e). Finally, if the parents are not successful in resolving their concerns amicably or through a due process hearing, they may bring a civil action within 90 days of the decision. *Id.* § 1415(i)(2)(B).

The limitation on tuition reimbursement also does not leave parents whose children have never previously received services without relief should an IEP ultimately be found inadequate to offer a free appropriate public education. Hearing officers have extensive remedial authority beyond tuition reimbursement, all of which remains available to parents whose children have never received services. Hearing officers often, for example, order specific revisions to an IEP. *See* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 58 Admin. L. Rev. 401, 410 & n.60 (2006). Hearing officers also have invoked their equitable powers to order training of school district personnel and to order school districts to hire an outside consultant. *Id.* at 417-419.

Perhaps most importantly, hearing officers can—and frequently do—rely on their equitable powers to craft an award of compensatory education appropriate to remedy the prior receipt of insufficient services. *See, e.g., Evanston Cmty. Consol. Sch. Dist. Number 65* v. *Michael M.*, 356 F.3d 798, 803 (7th Cir. 2004); *Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The courts of appeals have upheld the right of courts and hearing officers to award compensatory relief, finding this form of relief fits within the "broad discretion" to craft "appropriate relief" announced by this Court in *Burlington* and *Carter*. As the Fourth Circuit explains, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a [hearing officer or] court to remedy what might be termed an

educational deficit created by an educational agency's failure over a given period of time to provide a FAPE [free appropriate public education] to a student." *G. ex rel. RG* v. *Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). The D.C. Circuit further emphasizes that this equitable remedy should be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid ex rel. Reid* v. *District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

2. Allowing Parents To Resort To Private School Placements Before Working With A Public School District Contravenes IDEA's Collaborative Framework.

When Congress decided in 1997 that school districts should have a realistic opportunity to develop and implement an IEP that will provide a free appropriate public education, it was acting in a manner entirely consistent with the pre-existing collaborative framework of the Act. Indeed, if parents are allowed unilaterally to reject a public education and resort to a private school without even trying the proposed IEP—let alone giving the teachers and student a chance to make it work—that cooperative process would be undermined.

This Court has repeatedly held that governmental and administrative agencies are entitled to the presumption of regularity, *i.e.*, the assumption that public officials act lawfully and in good faith. *See United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) (noting that "a presumption of regularity attaches to the actions of Government agencies"); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("courts presume that [public officers] have properly discharged their official duties") (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Since "[b]y and large, public education in our Nation is committed to the control of state and local authorities," public school officials, like other governmental officials, are entitled to this

presumption. *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) (quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968)).

IDEA recognizes this presumption of good faith and "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children." *Schaffer*, 126 S. Ct. at 531 (quoting *Rowley*, 458 U.S. at 183). Educators are especially entitled to this presumption of regularity and good faith in their work with parents to develop an initial IEP for a student, especially since these educators know the ins and outs of the programs they offer much better than parents who have never tried them—or worse have never observed or met with a single teacher or administrator who implements them. Once public school staff develop an IEP, the presumption of good faith applies, and the IEP is presumed to be an appropriate method of ensuring that a child with disabilities is given the support necessary to succeed in the classroom. *See id.* at 537 (holding that a party challenging an IEP bears the burden of showing that the IEP was improper).

With the 1997 amendments to IDEA, Congress further reinforced the presumption of good faith that is due to public school officials. Many of these amendments, including the one at issue here, are designed to ensure that public school teachers and staff have the opportunity to work collaboratively with parents to craft an appropriate IEP before parents unilaterally place their child in a private school and seek tuition reimbursement. Since "IDEA relies heavily upon the expertise of school districts to meet its goals," public school officials should be given the chance to exercise their expertise and perform their duties. *Id.* at 536.

Permitting parents to seek private school tuition reimbursement before giving public school districts any opportunity to serve their children would undermine the presumption of good faith to which public school officials are entitled. The 1997 amendments to IDEA preserve the

presumption of good faith. Thus, the courts "should presume that public school officials are properly performing their difficult responsibilities under this important statute," and school districts should be given the opportunity to prepare and implement an IEP for a student before a parent may disregard the public schools, opt for a private school, and seek reimbursement. *Id.* at 537 (Stevens, J., concurring).

Under *Burlington* and before 1997, parents had no obligation to give a public placement a fair shake; they could proceed straight to their tuition reimbursement claim. Congress put an end to that. While "IDEA mandates individualized appropriate education for disabled children, it does not require a school district to provide a child with the specific educational placement that [his] parents prefer." *T.F.* v. *Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 821 (8th Cir. 2006) (quotation omitted).

Unilateral refusal to try an IEP means that school officials are never given the opportunity to make (or refuse to make) changes depending on how a child responds to the IEP developed. While there is no guarantee that a proposed IEP will always accommodate every child, the school district should have the opportunity—and to an extent has a duty to try—less restrictive alternatives than private placements. *See, e.g., id.* at 821 ("district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement"). And if a problem with the IEP becomes apparent, school districts need to be able to investigate and respond to the problem—before being saddled with tens of thousands of dollars in tuition reimbursement. *See M.C. on behalf of J.C.* v. *Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) (district "may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem").

When parents unilaterally place their child in a private school before implementation of a collaboratively developed IEP, and then pursue a due process hearing, school districts are also denied the ability to litigate the case on an even footing with the parents. For example, the hearing officer is forced to evaluate in a vacuum whether the IEP would have been appropriate, because the child has no experience with the placement. This necessitates an abstract inquiry. Although an IEP is supposed to be judged prospectively as of the time it was developed, in many cases, the parents point precisely to how the child is doing in the private placement as some sort of "proof" of their speculation that the public placement was not sufficient. In addition to encouraging improper "Monday morning quarterbacking" of the IEP developed by the public school, the parent's "proof" of private school success is meaningless in the absence of having tried the public placement. A school district has much more limited—if any—means of defending its placement proposal when it is embodied only in a piece of paper and the student has never tried it.

Parents and their attorneys could then sit back in hopes that the school district members of an IEP team would somehow misjudge some aspect of a child's educational needs—or at least that the parents and their attorneys would be able to convince a hearing officer or administrative law judge that the school district did, a process made easier by asking the hearing officer to compare the school district's proposed program to the private school's actual program (which often costs two, three, or four times as much). This would damage the collaborative nature of the IEP process.

IEPs in those circumstances would not be prepared by cooperative teams of parents and educators, as IDEA envisions, but instead would become mere adversarial antecedents to litigation by parents with little or no interest in pursuing a public education for their child in the first place. One case that highlights this problem is *Carmel Central*

School District v. *V.P. ex rel. G.P.*, 373 F. Supp. 2d 402 (S.D.N.Y. 2005). In that case, the parents of a fourteen-year-old girl who had never attended public school unilaterally enrolled her in a private school—and then came to Carmel Central School District for the express purpose of requesting an IEP placing their child at that private school and threatening to seek tuition reimbursement if the school did not agree with them that the only proper placement for their daughter was at that private school. The parents, who were new to Carmel Central School District and whose daughter had never attended public school, provided the school with inaccurate and incomplete information about their daughter's background and needs. They offered "superficial and *pro forma*" cooperation in the development of an IEP, and they "refused to observe or familiarize themselves with the public school classes that the [school district] thought might be appropriate for [the child] or to contact the administrators who would have been involved in working with the girl in the public school." *Id.* at 416. Because the parents "never had the slightest intention of allowing the child to be educated in the public school, [they] did everything possible so that they could frustrate a timely review of [her] condition before they re-enrolled her in [the private school]." *Id.*

The district court ruled against the parents' request for tuition reimbursement as a matter of law. It looked at the 1997 tuition-reimbursement provision and recognized that Congress did not intend tuition reimbursement as a reward for parents who "go[] through the motions of a [IEP] process while harboring not the slightest intention of doing anything other than keeping" their child at a private school. *Id.*

This Court should do the same. Parents should not be permitted to access a publicly funded private school education without engaging in any good faith effort to find an appropriate public school placement for their child. To rule in favor of Respondent—and against school districts like Carmel Central who are at an inherent disadvantage if

parents do not genuinely engage in what is meant to be a collaborative process—would only encourage more parents to follow suit.

It is unfair to allow parents to merely pretend to cooperate during the development of an IEP. Such a charade is a waste of valuable time and resources if the parents do not bring a good faith interest in the public education process. Congress expressly sought to prevent this result by limiting the situations when tuition reimbursement might be "appropriate" under *Burlington* to those in which parents have given the public schools a genuine opportunity to serve their child and the public schools have failed to do so. Upholding the Second Circuit's decision would only encourage private-school parents of children with disabilities to refrain from articulating their precise concerns until it is too late for the school district to resolve them.

D. Permitting Reimbursement For Private School Placements Made Before The Child Ever Receives Special Education Services From A Public School Also Would Increase Litigation Costs And Divert Resources From Education.

Litigation costs under IDEA are often prohibitive for school districts. *See, e.g.*, Nanette Asimov, *Extra-special Education at Public Expense*, S.F. Chron., Feb. 19, 2006 at A1 (school district paid $239,044 to defend its position that autistic student did not need horseback riding and swimming pool therapy). Congress is aware of this fact, and has been trying to rein in these costs. As a Senate Report from the 1997 amendments makes clear, "[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law." S. Rep. No. 104-275 at 85 (1996); *see also, e.g., id.* (noting that "teachers, administrators, and principals, on the whole, act in good faith to implement what is an exceptionally complex and procedural law" and that " IDEA is already one of the largest

under funded Federal mandates; it is wrong for courts to impose even greater financial burdens on these financially strapped districts as punishment for trying to do their job."); H.R. Rep. No. 108-77 at 85; 150; 150 Cong. Rec. S5250, S5337 (daily ed., May 12, 2004)(statement of Sen. Corzine); 149 Cong. Rec. H3458, H3470 (daily ed., Apr. 30, 2003)(statement of Rep. McKeon).

Ruling that *Burlington* and *Carter* are not limited by Section 1412(a)(10)(C)(ii) would only result in a continued flood of private school parents seeking to play in a tuition-reimbursement lottery, regardless of their interest (or lack thereof) in securing a public education for their children. It would place school districts nationwide, including many small and financially strapped districts, in the untenable position of being forced to choose between an expensive private school placement on one hand and costly litigation on the other. IDEA was never intended to create such a dilemma for school districts or to offer such windfalls to parents who prefer private schools. The reality for school districts is that the Court's holdings in *Burlington* and *Carter* exploded the number of tuition reimbursement cases that school districts must litigate, mediate, or settle.

In the last decade, the number of private placements has increased at more than *twice* the pace that the number of special education students has increased. According to the United States Department of Education, there were 88,098 students with disabilities educated in private schools at public expense in 2005. From 1996-2005, while the number of children ages 6-21 who receive special education and related services for all disabilities rose by 17% across the Nation, the number of children in publicly funded private placements rose by over 34%. *See* United States Department of Education, IDEA data, Table 2-5, *supra*.[9]

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[9] For example, last year approximately 7,445 disabled students attended private schools in New York at public expense because

Requiring a student who has never received special education and related services from the public school to try the public school placement that results from the collaborative IEP process ensures that the parents and school district carry the cooperation they began in developing the IEP to the next stage—implementation. This continued collaboration may include monitoring and training for staff, teachers, and administrators, *see, e.g.*, *Bradley* v. *Arkansas Dep't of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006), *Lewisville Indep. Sch. Dist.* v. *Charles W*, 81 Fed. Appx. 843, 844 (5th Cir. 2003); adjusting the level of services, *see Dong* v. *Board of Educ. of Rochester Cmty. Sch.*, 197 F.3d 793 (6th Cir. 1999); adjusting the type of services, *see Nack* v. *Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006); and responding to parental concerns and input, *see Alex R.* v. *Forrestville Valley Cmty. Unit Sch.*, 375 F.3d 603, 610 (7th Cir. 2004). Congress' decision to require continued collaboration through implementation of the IEP—before allowing a parent to opt out of the public school placement and unilaterally reject that placement as inadequate—furthers IDEA's overarching goal of ensuring all children have access to a *public* education that is appropriate.

CONCLUSION

For the foregoing reasons, as well as those contained in the petitioner's brief, the Second Circuit's decision should be reversed.

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the school district agreed that it could not provide them with a free appropriate public education in one of its public schools. Joseph Berger, *Private Schooling for the Disabled and the Fight Over Who Pays*, N.Y. Times, Mar. 31, 2007 at A9. By contrast, only 210 students requested private school tuition reimbursement in 1995. *See* Yilu Zhao, *Rich Disabled Pupils Go to Private Schools at Public Expense*, N.Y. Times, Apr. 17, 2002 at B7; *see also* Mary Ellen Egan, *A Costly Education*, Forbes, Apr. 9, 2007 at 88 (noting the number of due process hearing requests in New York City jumped by 33% from 2000-2006).

Respectfully submitted,

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